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No. 06-984

In the Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

In the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States)*, 2004 I.C.J. 128 (Mar. 31), the International Court of Justice determined that, based on violations of the Vienna Convention, 51 named Mexican nationals, including Petitioner José Ernesto Medellín, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. Prior to the *Avena* decision, Medellín had submitted an application for habeas corpus relief in Texas state court, based in part upon a violation of the Vienna Convention. That claim was reviewed and rejected, *inter alia*, on the merits.

Subsequently, the President issued a "Memorandum for the Attorney General" ("Executive memorandum"), stating that he had determined that the United States would "discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."

This case presents the following questions:

1. Does Medellín's petition for a writ of certiorari present an actual controversy within the Court's jurisdiction when Texas courts have already provided the review of his conviction and sentence prescribed by *Avena*?

2. Does the Executive memorandum constitute binding federal law abrogating Article 11.071, Section 5 of Texas's Code of Criminal Procedure governing the availability of a state writ of habeas corpus?

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because it fails to present an actual case or controversy within the Court's jurisdiction, and, in any event, the Texas Court of Criminal Appeals correctly concluded that the Executive memorandum cannot preempt Article 11.071, Section 5 of the Texas Code of Criminal Procedure.

Medellín urges the Court to grant review in order to resolve whether, under either the *Avena* decision itself or the Executive memorandum, Texas state courts must provide him the review and reconsideration of his case prescribed by *Avena*. But when his first application for state habeas relief was adjudicated, Texas courts provided the merits review of Medellín's conviction and sentence ultimately required by *Avena*. Given that the *Avena* decision has already been "given effect" in Medellín's case, the questions presented in his petition are moot.

And, even if the questions presented in his petition were not rendered moot by the review of his case already provided by Texas courts, the petition nonetheless would not warrant review. In *Sanchez-Llamas* v. *Oregon*, 126 S.Ct. 2669, 2683-85 (2006), the Court determined that decisions of the ICJ are not binding on American courts. Medellín's request that the Court revisit an issue decided last Term is without merit. Finally, the Court of Criminal Appeals correctly decided that the Executive memorandum cannot abrogate Texas's criminal procedure statute governing the availability of a state writ of habeas corpus. Medellín's contention otherwise finds no support in any provision of the Constitution, any federal statute, or the applicable jurisprudence of the Court. The petition should be denied.

STATEMENT

Medellín's Conviction for His Confessed Participation in the Gang Rape and Murder of Jennifer Ertman and Elizabeth Pena: On the evening of June 24, 1993, Medellín and fellow members of the "Black and Whites" gang in Houston, Texas, gathered together to initiate a new member, Raul Villareal. *Medellín* v. *State*, No. 71,997, slip op., at 2 (Tex. Crim. App. 1997); *Medellín I* Pet. App. 4a.[1] The initiation involved Villareal's fighting each member of the gang for a five to ten minute period, and culminated with his acceptance into the gang. *Id.*

Around 11:15 p.m., fourteen-year-old Jennifer Ertman and sixteen-year-old Elizabeth Pena were walking home from visiting a girlfriend when they took a shortcut that led them near Medellín and his fellow gang members. *Id.* As they passed Medellín, he attempted to engage Elizabeth in conversation. *Id.* When she tried to run, Medellín grabbed her and threw her to the ground. *Id.* Elizabeth screamed for Jennifer to help her. *Id.* In response to her friend's cries, Jennifer ran back to help, but she was grabbed by two other gang members and also thrown to the ground. *Id.*

As Medellín later confessed, what ensued was the brutal gang rape and murder of both Jennifer and Elizabeth. *Id.*, at 5a. The gang members orally, vaginally, and anally raped both girls. *Id.* When they were done, they strangled both girls to death. *Id.*, at 5a-6a.

At approximately 4:00 a.m. on June 29, 1993, Medellín was arrested in connection with the gang rape and murder of

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1. Citations to materials in the Appendix to Medellín's prior petition for a writ of certiorari submitted in *Medellín* v. *Dretke*, 544 U.S. 660 (2005) (*Medellín I*), will be referenced herein as "*Medellín I* Pet. App.," followed by the page number(s).

Jennifer and Elizabeth. 30.TR.629-30.[2] Between 5:54 and 7:23 a.m. on that same day, after reading *Miranda* warnings aloud and signing a written waiver, Medellín gave a written confession of his participation in the crime. *See Medellín I* Joint Appendix at 14-18. At that time, Medellín, a Mexican national who had lived most of his life in the United States, was not notified by law enforcement authorities of the Vienna Convention provision permitting him to seek assistance from the Mexican consulate following his arrest.[3]

Medellín was convicted of murder during the course of a sexual assault — a capital offense. 33.TR.66-68. The jury recommended a death sentence, and the district court sentenced Medellín to death. *Medellín I* Pet. App. 3a. Medellín, who had the assistance of two court-appointed attorneys, did not assert any claim under the Vienna Convention at trial or sentencing.

Medellín's First State Habeas Application: The Texas Court of Criminal Appeals affirmed Medellín's conviction and sentence in an unpublished opinion. *See* Exhibit B to Medellín's Application for Writ of Habeas Corpus (hereafter

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2. "TR" refers to the reporter's record, preceded by the volume number and followed by the page numbers.

3. The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving nation." *United States v. Alvarado-Torres*, 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(b), 21 U.S.T. 77, 101; *Medellín I* Pet. App. 137a-38a. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

referenced as the "First Application"). Rather than petition this Court for certiorari, Medellín contacted the Mexican consulate, and the consular authorities began assisting him with a state habeas corpus application. Eleven months later, Medellín filed his First Application seeking habeas corpus relief.

In his First Application, Medellín asserted for the first time that the failure to notify him of his right to inform the Mexican consulate of his arrest for capital murder violated his rights under the United States Constitution. *See* First Application at 25.[4] The district court concluded that Medellín's Vienna Convention claim should fail, *inter alia*, because he failed to show that he was harmed by any Vienna Convention violation. Specifically, the trial court found that Medellín "fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment." *Medellín I* Pet. App. 56a. The Texas Court of Criminal Appeals found the trial court's conclusions to be supported by the record and affirmed. *Id.*, at 32a-33a.

Federal Habeas Proceedings in the District Court and the Fifth Circuit: After his First Application was rejected, Medellín filed a petition for a writ of habeas corpus in federal district court. *See Medellín* v. *Cockrell*, No. H-01-4078 (S.D. Tex. June 25, 2003); *Medellín I* Pet. App. 59a-118a. Medellín asserted that he should receive a new trial because he had not been advised of his right to consular notification under the Vienna Convention. *Id.*, at 79a.

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4. The only harm Medellín alleged in his First Application as arising from the failure to notify him of his rights under the Vienna Convention was that his confession should not have been considered by the jury because it was "obtained in violation of the Vienna Convention on Consular Relations." First Application at 31.

The federal district court rejected that claim, *id.*, at 79a-85a, holding that Medellín's failure to raise his Vienna Convention claim at trial as required by Texas's contemporaneous-objection rule constituted an adequate and independent state ground barring federal habeas review. *Id.*, at 79a-82a. Applying the Court's decision in *Breard* v. *Greene*, 523 U.S. 371, 375-76 (1998) (per curiam), the district court also rejected Medellín's argument that Vienna Convention claims are exempt from the procedural default doctrine. *Id.*, at 80a-81a.[5]

Finally, the federal district court, like the state courts, rejected Medellín's Vienna Convention claim on the merits. The court concluded that Medellín "failed to show prejudice for the Vienna Convention violation," *id.*, at 85a, and that the state court's determination that he failed to show "concrete, non-speculative harm" was not "'contrary to, or an unreasonable application of, federal law.'" *Id.*, at 84a (quoting 28 U.S.C. §2254(d)(1)). The district court denied both Medellín's claim for habeas relief and his application for a certificate of appealability. *Id.*, at 118a.

Medellín subsequently applied to the Fifth Circuit for a COA, which was denied. *See Medellín* v. *Dretke*, 371 F.3d 270, (CA5 2004); *Medellín I* Pet. App. 119a-135a. While Medellín's

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5. Medellín argued that the federal court should follow the post-*Breard* decision of the International Court of Justice in *Federal Republic of Germany* v. *United States*, 2001 I.C.J. 466 (June 27) (*LaGrand*). In *LaGrand*, the ICJ determined that the consular notification provisions in Article 36 of the Vienna Convention created individual rights, and that the application of procedural default to preclude the LaGrands from challenging their convictions violated Article 36(2) of the treaty by "preventing 'full effect [from being] given to the purposes for which the [consular notification] rights accorded under this article are intended.'" *Id.*, ¶91, at 497-98. Noting conflict between *LaGrand* and *Breard*, the district court declined to follow the *LaGrand* decision's holding that procedural default should not apply to Vienna Convention claims. *Medellín I* Pet. App. at 82a.

application for COA was still pending in the Fifth Circuit, the ICJ issued its decision in *Avena*; Appendix to the Petition ("Pet. App.") at 86a-186a.

The ICJ concluded that Article 36 had been violated in the case of Medellín and 50 other Mexican nationals. *Id.*, at ¶¶106, 153; Pet. App. 155a-57a, 182a-85a. The ICJ rejected Mexico's request for annulment of the convictions and sentences, and concluded that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other 50 Mexican nationals. *See id.*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a. The ICJ further concluded that the "review and reconsideration" must take place within the judicial system of the United States, and that the doctrine of procedural default could not bar such review. *See id.*, at ¶¶111-13, 120-22, 133-34, 138-41; Pet. App. 159a-61a, 164a-65a, 170a-71a, 173a-74a.

Although the Fifth Circuit acknowledged the ICJ's decisions in *Avena* and *LaGrand*, it held that it was bound by this Court's decision in *Breard* that Vienna Convention claims are subject to procedural default, and that Medellín had therefore defaulted any claim he might have under the Convention. *See Medellín I* Pet. App. 132a. The court also held that Medellín could not prevail because a prior Fifth Circuit panel had held that Article 36 of the Vienna Convention does not create an individually enforceable right, and the court was required to follow its own precedent. *Id.*, at 133a.

***Medellín I*: Proceedings Before This Court on Medellín's First Petition for a Writ of Certiorari:** The Court subsequently granted certiorari in Medellín's case to resolve two questions: (1) whether a federal court was bound by the ICJ's *Avena* decision that United States' courts must reconsider Medellín's Vienna Convention claim without regard to procedural default doctrines; and (2) whether a federal court

must give effect to the ICJ's *Avena* decision as a matter of judicial comity and uniform treaty interpretation. *Medellín* v. *Dretke*, 544 U.S. 660, 661 (2005) (per curiam) (*Medellín I*).

While the case was pending before the Court, the President issued a document styled as a "Memorandum for the Attorney General." Pet. App. 187a. The operative language of the memorandum reads as follows:

> "I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." *Id.*

The memorandum was subsequently circulated by the U.S. Attorney General to the Attorney General of Texas. Pet. App. 76a. After the Executive memorandum issued, Medellín filed a subsequent state application for a writ of habeas corpus. The subsequent application relied on the memorandum and the *Avena* decision as bases for relief that were not available when he filed his first application for state habeas relief. *Medellín*, 544 U.S., at 663-64. Based in part on both the Executive memorandum and the filing of Medellín's subsequent state habeas application, the Court dismissed the writ as improvidently granted. *Id.*, at 666-67.

Proceedings in the Texas Court of Criminal Appeals on Medellín's Subsequent Application for State Habeas Relief: Under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure, Texas courts may not consider the merits of any claims raised on a subsequent application for a writ of

habeas corpus, or grant relief on such claims, unless the applicant provides sufficient specific facts demonstrating that:

> "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071, §5(a)(1).

Texas courts have no jurisdiction to review a subsequent habeas application that fails to meet the requirements of Article 11.071.

In support of his subsequent habeas application, Medellín argued that the *Avena* decision and the Executive memorandum constituted binding federal law that preempt Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure. *See* Br. of Applicant at 26-27. In the alternative, Medellín argued that he met the requirements of Section 5(a)(1) because the *Avena* decision and the Executive memorandum constitute factual and legal bases that were unavailable when he filed his first application for state habeas relief. *Id.*, at 52-53.

The Texas Court of Criminal Appeals disagreed. The court first rejected Medellín's claim that *Avena* preempts Section 5, concluding that in *Sanchez-Llamas*, this Court considered and rejected the argument that ICJ decisions are binding federal law. Pet. App. 21a-24a. The court next addressed Medellín's argument that the Executive memorandum preempts Section 5, and accordingly requires Texas courts to review and reconsider Medellín's conviction and sentence as prescribed by *Avena*. Although all the members of the Court of Criminal Appeals agreed that the Executive memorandum did not preempt Section 5, the court did not generate a majority

opinion on this issue. *See* Pet. App. 1a, 24a-55a, 64a-71a, 74a-79a.

Judge Keasler's plurality opinion,[6] Pet. App. 24a-55a, assumed — without deciding — that the memorandum constituted an executive order requiring Texas's compliance. Pet. App. 24a-25a. The plurality observed that, although the President's power, when acting in external affairs, is "'plenary and exclusive . . . as the sole organ of the federal government in the field of international relations,'" Pet. App. 26a (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)), nonetheless "[e]xecutive orders issued by the President must be authorized by an act of Congress or by the Constitution." Pet. App. 27a (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)). Treating the Executive memorandum as an order intended to bind Texas courts, the plurality considered the memorandum to be an "unprecedented" exercise of executive power, Pet. App. 29a, and held that he had exceeded his constitutional authority "by intruding into the independent power of the judiciary." Pet. App. 30a.

The plurality concluded that the Executive memorandum — like the *Avena* decision itself — improperly attempts to invest the ICJ with the power to determine the meaning and effect of a treaty as a matter of United States domestic law. *See id.*

Presiding Judge Keller filed a concurring opinion opining that the President does not have the power to order a state court to ignore rules of procedural default and statutes governing successive habeas corpus petitions in order to reevaluate whether Medellín was prejudiced by a failure to comply with the Vienna Convention. Pet. App. 64a-65a. She observed that the Court has typically declined to construe executive agreements or treaties as preempting state laws

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6. This opinion was joined by Judges Meyers, Price, and Hervey. Pet. App. 1a.

involving "traditional area[s] of state competence and applied equally to citizens and non-citizens," Pet. App. 67a, most recently in the *Sanchez-Llamas* decision recognizing that the Vienna Convention does not preempt state rules of procedural default, *id.* (citing *Sanchez-Llamas*, 126 S.Ct., at 2682-88). She concluded that, to the extent the President is purporting to preempt state criminal procedure statutes through his memorandum, he is not acting pursuant to any authorization conferred by the Vienna Convention or the Optional Protocol. *See id.*

Based on this analysis, Presiding Judge Keller concluded that the President's "unprecedented, unnecessary, and intrusive exercise of power over the Texas court system cannot be supported by the foreign policy authority conferred on him by the United States Constitution." Pet. App. 71a.

Judges Hervey and Cochran also filed opinions concurring in the court's decision that the Executive memorandum does not preempt Section 5 of Article 11.071. Pet. App. 74a-79a. Judge Hervey, referencing the alternative merits holding in Medellín's First Application that he failed to establish that he suffered any prejudice from the Vienna Convention violation, concluded that the "review and reconsideration" required by *Avena* and or the Executive memorandum has already occurred, and the case therefore presents no actual controversy. Pet. App. 74a.

Judge Cochran agreed that the Executive memorandum did not preempt Section 5 of Article 11.071 because she did not consider the memorandum to "constitute[] the enactment of federal law that is binding on state courts." Pet. App. 76a.[7] She observed that executive orders, "except those which do not have general applicability and legal effect or are effective only

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7. Judges Johnson and Holcomb joined Judge Cochran's concurring opinion. Pet. App. 76a.

against federal agencies, are drafted, reviewed, and promulgated in a specific manner and then published in the Federal Register." Pet. App. 77a. Under the circumstances, and given that the memorandum is not published in the Federal Register and could be found only on the White House Press Release website, Judge Cochran could not "accept the proposition that binding federal law . . . can be accomplished through a Presidential press release of a private memorandum directed to the Attorney General." Pet. App. 78a-79a.

Finally, the Court of Criminal Appeals held that — as a matter of state law — neither the *Avena* decision nor the Executive memorandum constituted a previously unavailable "factual basis" or "legal basis" for Medellín's habeas claims, and therefore his subsequent application did not meet the requirements of Article 11.071, Section 5(a)(1) so as to permit the court to provide further review and reconsideration of his Vienna Convention claim. *See* Pet. App. 56a-64a.[8]

REASONS TO DENY THE PETITION

Medellín's petition contends that the Texas Court of Criminal Appeals erred in determining that neither the *Avena* decision nor the Executive memorandum constitute binding federal law that preempts Article 11.071 of the Texas Code of Criminal Procedure. *See* Pet., at 23, 26. Neither of these contentions warrants certiorari review.

I. THE QUESTIONS PRESENTED IN THE PETITION ARE MOOT.

Medellín asserts that two questions are presented for the Court's review in this case: (1) whether state courts are bound by the Constitution to enforce the ICJ's *Avena* decision; and (2) whether the President acted within his foreign affairs authority when he issued a memorandum stating that the United States

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8. Medellín's Petition for Writ of Certiorari does not ask the Court to review this state-law determination of the Court of Criminal Appeals.

would meet its international obligations under *Avena* by having state courts give effect to the decision. *See* Pet., at i.

Both of Medellín's contentions are premised on the supposition that the ICJ's *Avena* decision has not been "given effect" as to Medellín, meaning that he has never received a review and adjudication as to whether the Vienna Convention violation in his case caused him actual prejudice. But Medellín received the actual prejudice review of his conviction and sentence, ultimately prescribed by the ICJ in *Avena*, when his first application for state habeas corpus relief was adjudicated. For that reason, Texas has already "given effect" to *Avena* in Medellín's case, and the questions of executive power and the enforceability of ICJ decisions in domestic courts set forth in Medellín's petition are moot.

A. *Avena* Required Domestic Courts to Review Whether Vienna Convention Violations Caused "Actual Prejudice" to Foreign Nationals.

In *Avena*, the ICJ prescribed a specific remedy for the Article 36 violations it concluded had occurred in the case of Medellín and 50 other Mexican nationals. Rejecting Mexico's request for annulment of their convictions and sentences, the ICJ stated that the remedy for the Article 36 violations was that the United States must provide "review and reconsideration" of the sentences and convictions of Medellín and the other Mexican nationals. *See Avena*, at ¶¶14, 121-23, 153(9); Pet. App. 106a-07a, 165a-66a, 185a.

This "review and reconsideration," required a review "with a view to ascertaining whether in each case . . . the violation . . . *caused actual prejudice to the defendant* in the process of the administration of justice." *Id.*, ¶121; Pet. App. 165a (emphasis added). The ICJ viewed this review as addressing the question "whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties . . ." *Id.*, at

¶122; Pet. App. 165a. Thus, *Avena* prescribed a merits inquiry by a domestic court in each case to determine whether the Vienna Convention violation actually prejudiced the convicted Mexican national — that is, whether the violation ultimately caused their conviction and sentence.

B. The Resolution of Medellín's First Application for State Habeas Corpus Relief Satisfied *Avena*.

In its findings of fact and conclusions of law concerning Medellín's First Application, the state trial court rejected his Vienna Convention claim on several alternative grounds. *See Medellín I* Pet. App. 55a-57a. One of those alternative holdings, consistent with the ICJ's subsequent decision in *Avena*, addressed the merits of Medellín's claim, particularly whether he had established that the violation actually caused his conviction or punishment:

> "The applicant fails to show that his rights, pursuant to U.S. CONST.amends. V, VI, and XIV, were violated and *fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. Ex parte Barber*, 879 S.W.2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Medellín I* Pet. App. 57a (emphasis added).

The trial court also concluded that Medellín "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellín] was provided with effective legal representation upon [his] request; and [his] constitutional rights were safeguarded." *Id.*, at 56a. The Texas Court of Criminal Appeals found these conclusions to be supported by the record and affirmed. *Id.*, at 32a-33a.

These alternative merits holdings establish that Texas courts have already provided the review prescribed by *Avena* in resolving his First Application for state habeas relief. Indeed, the *Barber* standard applied by the Texas court, requiring that the complained-of error must have "contributed" to the applicant's conviction or punishment to merit relief, is even more stringent than the ICJ's formulation that the courts should review whether the Article 36 violation "ultimately led to convictions and severe penalties." *Avena*, at ¶122; Pet. App. 165a.

Because Texas already provided the review *Avena* prescribed when it resolved Medellín's First Application, the questions whether the *Avena* decision or the Executive memorandum preempt Texas law are moot. This Court, like all federal courts, lacks jurisdiction to decide moot cases because its constitutional authority extends only to actual cases or controversies. *See Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam). Medellín's petition should therefore be denied.

II. The Court Has Already Determined That ICJ Decisions Are Not Binding on Domestic Courts.

Even if Medellín's petition otherwise presented an actual controversy within the Court's jurisdiction, he erroneously suggests that the case warrants review to decide the question whether the ICJ's *Avena* decision is binding on American courts. Pet., at i, 15-16. The Court, however, squarely decided this question last Term in *Sanchez-Llamas*. This case does not warrant review in order for the Court to revisit that issue.

In *Sanchez-Llamas*, the Court considered and rejected the argument that the ICJ's decisions are controlling on American courts. *See Sanchez-Llamas*, 126 S.Ct., at 2683-85. The Court first addressed the arguments that the decisions in *LaGrand* and *Avena* required the Court to revisit its holding in *Breard* regarding the applicability of doctrines of procedural default to

Vienna Convention claims, and that the United States was obligated to comply with the ICJ's interpretation of the Convention. *Id.*, at 2683. The Court expressly rejected these arguments, concluding that, although the ICJ's interpretation of the Vienna Convention merited "'respectful consideration,'" the *LaGrand* and *Avena* decisions did not "compel us to reconsider our understanding of the Convention in *Breard*." *Id.* (quoting *Breard*, 523 U.S., at 375).

Significantly, the Court made clear that its conclusions were not limited to the *Avena* and *LaGrand* decisions, or to the particular facts and circumstances presented in *Sanchez-Llamas*. Rather, the Court's language was comprehensive: "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." *Id.*, at 2684. Noting that the ICJ's "principal purpose is to arbitrate particular disputes between national governments," and that its decisions "are not binding precedent *even as to the ICJ itself*," the Court found "little reason to think that such interpretations were intended to be controlling on our courts." *Id.* Based on its conclusion that ICJ decisions are not binding on U.S. courts, the Court confirmed that the decisions in *LaGrand* and *Avena* are "entitled only to the respectful consideration due an interpretation of an international agreement by an international court." *Id.*, at 2685 (internal quotation omitted).

Medellín now invites the Court to revisit the issue it considered and decided in *Sanchez-Llamas* whether an ICJ decision is binding on domestic courts. *See* Pet., at i, 15-16. Medellín reasons that his case is not encompassed by *Sanchez-Llamas* because, unlike the petitioners in that case, he was one of the Mexican nationals specifically named in the *Avena* decision. Pet., at 15-16.

But this distinction is irrelevant. The Court's determination in *Sanchez-Llamas* that ICJ decisions are not

binding on domestic courts was not qualified by the fact that the defendants in that case were not named in *Avena* or *LaGrand*. *See id.*, at 2683-85. Indeed, the Court made clear that ICJ decisions have "'*no binding force* except between the parties and in respect of that particular case," and that "'[o]nly states [*i.e.* countries] may be parties in cases before the [ICJ].'" *Id.*, at 2684 (quoting STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, arts. 34, 59, 59 Stat. 1055 (1945)). Neither Medellín nor the State of Texas were parties to the *Avena* decision and, as the Court explained in *Sanchez-Llamas*, although the United States "has agreed to comply with ICJ decisions in any case to which it is a party, the [U.N.] Charter's procedures for noncompliance-referral to the Security Council by the aggrieved state-contemplates quintessentially *international* remedies." *Id.*, at 2684-85 (internal quotation omitted).

Thus, *Sanchez-Llamas* recognizes that non-parties to ICJ decisions have no standing to enforce such decisions in any domestic forum. Finally, there is no indication in *Sanchez-Llamas* that the Court's unqualified conclusion that the ICJ's decisions do not bind American courts is somehow limited in cases brought by individuals referenced in a particular ICJ decision. *See id.*, at 2683-85. The Court should decline Medellín's invitation to reconsider an issue squarely addressed just one year ago in *Sanchez-Llamas*.

III. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY CONCLUDED THAT THE EXECUTIVE MEMORANDUM CANNOT PREEMPT TEXAS CRIMINAL LAW.

Because the Court of Criminal Appeals correctly concluded that, under the Constitution, the Executive memorandum cannot preempt Article 11.071 of the Texas Code of Criminal Procedure, this case does not warrant review.

A. The Executive Memorandum Exceeds the President's Authority Under the Constitution.

The Court has consistently recognized that the President's Article II powers are limited to executing, not creating, the law. The Court explained this principle in *Youngstown*: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be the lawmaker . . . And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown*, 343 U.S., at 587-88. The Court reaffirmed this principle just last Term in *Hamdan* v. *Rumsfeld*, 126 S.Ct. 2749 (2006), in its rejection of unilateral executive authority to create special military tribunals beyond the scope of congressional authorization, *id.*, at 2773 (""The power to make the necessary laws is in the Congress; the power to execute in the President."") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)).

Medellín's contentions rely upon just such a hypothetically limitless executive power to create law based on unilateral decisions concerning the foreign affairs interests of the United States. But no enumerated power in Article II allows the President to order a State to disregard its own habeas corpus statute and review a claim based on the decision of a foreign tribunal that this Court has determined has no binding effect on domestic courts.

1. The text of Article II does not confer power on the President to create domestic law incident to his treaty-making or foreign affairs powers.

Medellín argues that the Executive memorandum constitutes binding federal law preempting Texas procedural rules based upon the President's powers set forth in Article II, §§1-3. But no constitutional provision supports his authority to issue such an order. Neither the text of the Vesting Clause nor the President's foreign affairs powers gives him the

authority to create domestic law incident to treaty-making. That power is allocated by the Constitution to Congress. *See* U.S. CONST. art. II, §2(2).

Although the President has a general power to "make" treaties, Article II, Section 2 qualifies that power by requiring the consent of two-thirds of the Senate before a treaty becomes the "supreme Law of the Land." *See id.* And it is well-established that the President is bound by the reservations and conditions imposed by the Senate in granting its consent, including what effect a treaty will have in domestic law.[9] Indeed, as the United States argued in its *amicus* brief filed in *Medellín I*, the Senate ratified the Vienna Convention — the treaty underlying the *Avena* decision — with the express understanding that the Convention does not "change or affect present U.S. laws or practice." U.S. *Medellín I* Amicus Br., at 21-22 (stating that "[t]he Senate Foreign relations Committee . . . cited as a factor in its endorsement of the treaty that '[t]he Convention does not change or affect present U.S. laws or practice.'") (quoting S. Exec. Rep. No. 91-9, at 2 (1969)).

Because there has been no action by Congress rendering the *Avena* judgment self-executing federal law, the decisions of the ICJ, necessarily including *Avena*, do not of themselves constitute federal law binding on American courts. *See Sanchez-Llamas*, 126 S.Ct., at 2683-85. There is thus no basis in Article II, Sections 1 or 2, supporting a unilateral Executive power to declare that the judgment of a foreign tribunal must be "given effect" as binding federal law displacing a state habeas corpus statute.

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9. For example, the Senate routinely declares that human rights treaties are not self-executing. *See* Comm. on Foreign Relations, International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 9, 19, 23 (1994); Comm. on Foreign Relations, Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. No. 101-30, at 30-31 (1992).

For similar reasons, the President lacks authority under Article II, Section 3's "Take Care" Clause to impose the memorandum on the States. Where, as here, there is no treaty or international law obligation that has created of its own force a directly cognizable federal law, *see Sanchez-Llamas*, 126 S.Ct., at 2683-85, there is nothing for the President to "faithfully execute."

2. The treaties and statutes on which Medellín relies do not vest the President with power to transform a non-binding ICJ decision into binding federal law.

The United States has explicitly acknowledged that neither the Vienna Convention nor its Optional Protocol on ICJ jurisdiction create rights that are directly enforceable in domestic courts. *See* U.S. *Medellín I* Br., at 20-21, 33-34. Nonetheless, both the United States and Medellín have argued that the obligation in Article 94 of the U.N. Charter to comply with ICJ decisions implicitly grants to the President the power to render such decisions binding on domestic courts. *See* U.S. *Medellín I* Br., at 38-39, 42-43; Pet., at 20-21.

But this view of the President's foreign affairs powers ignores the significant distinction between international obligation and domestic lawmaking. Under our constitutional system not every treaty creates domestic law rights, obligations, or powers. This is the essence of a "non-self-executing treaty." And it has long been clear that the responsibility for transforming an international law obligation into a domestic rule of law falls to Congress, not the President.[10] Indeed, the Constitution expressly grants to

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10. *See Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 319 (1829) (Where a treaty merely represents a promise of the United States under international law, "the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to

Congress the authority to do so in the Necessary and Proper Clause of Article I. U.S. CONST. art. I, §8, cl.18; *see also Missouri* v. *Holland*, 252 U.S. 416, 431-32 (1920).

Further, if the Executive's power were truly so broad under Article 94, it would reflect the President's possession of substantial and previously unrecognized lawmaking power. Article 94 is only one of a variety of Charter obligations accepted by member States to comply with the decisions of U.N. institutions.[11] Perhaps the most significant of these is the commitment to carry out decisions of the Security Council. If Medellín and the United States are correct, then any formal agreement among members of the Security Council would by itself provide authority for the President to create binding domestic law on his own initiative — preemptive upon the States — without the involvement or authorization of Congress.

Nor do the federal statutes on which Medellín relies support the President's authority to issue a "memorandum" with preemptive force. Medellín cites to statutes generally authorizing or obligating the President to obtain the release of United States citizens detained abroad,[12] to protect foreign individuals in the United States as authorized by law,[13] and to oversee the relations of the United States with organs of the

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disregard the existing laws on the subject."); *see also Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . ").

11. *See* U.N. CHARTER art. 25 (obligating member States "to accept and carry out the decisions of the Security Council in accordance with the present Charter"); *id.*, art. 49 (obligating member States to "join in affording mutual assistance in carrying out measures decided upon by the Security Council" with regard to responses to breaches of the peace and acts of aggression).

12. 22 U.S.C. §1732.

13. 22 U.S.C. §4802(a)(1)(D).

United Nations.[14] Although these statutes assign an important role to the Executive Branch in protecting citizens traveling in foreign countries, and in generally coordinating the interactions of the United States with the United Nations, they do not provide any authorization for the President to mandate the state judiciary to implement *Avena*.

3. The President' s power in this instance is at its "lowest ebb" under *Youngstown*, and cannot survive scrutiny.

The validity of a President's exercise of his foreign affairs power has traditionally been evaluated not only under the text of the Constitution, but also based upon whether his actions are undertaken with the authorization of Congress or contrary to its will. *See Youngstown*, 343 U.S., at 635 (Jackson, J., concurring). As described by Justice Jackson in his *Youngstown* concurrence, the exercise of presidential power falls into three categories:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.
>
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
>
> 3. When the President takes measures incompatible with the expressed or implied

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14. 22 U.S.C. §287(a), 287a.

> will of Congress, his power is at its lowest ebb . . . Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.*, at 635, 637-38.

Judge Keasler's plurality opinion correctly concludes that the President's action in issuing the memorandum falls into *Youngstown*'s third category. Pet. App. 44a-45a. Indeed, the President's action is incompatible with the will of Congress for at least three reasons. First, the President's effort to enforce compliance with ICJ decisions through judicial means contravenes the Senate's express intention, when it ratified the U.N. Charter and the Optional Protocol, that ICJ decisions would be enforced only through diplomatic or political means. Second, central to the *Avena* decision is the proposition that the Vienna Convention confers individual rights enforceable in American courts. Because the Executive memorandum purports to compel compliance with that decision in state courts, it contravenes the intent of the Senate when it ratified the Vienna Convention. Finally, as noted by Judge Keasler, the President's action here does not arise from an executive agreement, much less an agreement acquiesced to by Congress, but rather reflects a unilateral executive policy decision.

The ratification histories of both the U.N. Charter and the Optional Protocol do not show any acquiescence by the Senate to the notion that ICJ decisions would be enforceable in domestic courts and certainly not by unilateral Executive memorandum. Rather, the ratification history of each treaty indicates that ICJ decisions were not intended to be judicially enforceable, but were to be enforced through diplomatic or political means. With respect to Article 94 of the U.N. Charter, which states that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party," the understanding at the time of ratification was that ICJ decisions

would be enforced exclusively through the Security Council pursuant to Article 94(2), which provides in turn that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council."[15]

Likewise, the ratification history of the Optional Protocol, which confers jurisdiction on the ICJ to adjudicate disputes arising over the interpretation and application of the Vienna Convention, shows that the intent on ratification was that ICJ decisions were meant to have only diplomatic or political force as opposed to judicial force in our domestic courts.[16] Given that the Senate did not intend decisions of the ICJ to be enforceable in American courts generally, the President's unilateral mandate that such a decision nonetheless should be enforced in state courts cannot be squared with the will of Congress.

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15. *See, e.g., A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (parties have a "moral obligation" to comply with ICJ decisions, and Article 94(2) constitutes the exclusive means of enforcing such decisions). 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies only in the Security Council; and in the Security Council an effective decision cannot be made to take action against a nation unless there is a unanimity of the Big Five.").

16. As a representative of the State Department explained in testimony before the Senate, "[i]f problems should arise regarding the interpretation or application of the [Vienna Convention], such problems would probably be resolved through *diplomatic* channels." Vienna Convention on Consular relations, S. Exec. Rep. No. 91-9, at 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (emphasis added). Mr. Lyerly further observed that "parties to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id.* And the State Department made clear that nothing related to the Convention was intended in any way to change U.S. laws or practice. *See* S. Exec. Doc. E, 91-1 (1969).

The Executive memorandum also conflicts with the will of Congress concerning the effect in domestic law of the Vienna Convention itself. By requiring that state courts implement *Avena*, the Executive memorandum necessarily attempts to impose the ICJ's interpretation of the Convention's enforceability in our domestic judicial system. But that was not the intended effect of the Convention.[17] Accordingly, the Executive's attempt to impose the *Avena* decision on Texas state courts, and abrogate a Texas statute in order to enforce the ICJ's mandate that Medellín has an individual right to further judicial review of his conviction and sentence, works directly against the will of Congress in ratifying the Convention.

Finally, to the extent the Court has previously recognized the President's independent authority in the field of foreign affairs, such recognition has been tied to congressional authorization or acquiescence in specific types of executive agreements. Because the memorandum is not based upon any executive agreement with Mexico concerning the remedy for the Vienna Convention violations addressed in *Avena*, but rather upon a policy decision made solely by the President and contrary to the will of Congress, it cannot be supported under even the broadest view of his foreign affairs power.[18]

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17. For example, a State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that "[t]he Vienna . . . Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." *Id.* The Department's testimony also emphasized the Vienna Conventions preamble, cited above, which states explicitly that the treaty's purpose is "not to benefit individuals." Appendix, S. Exec. Doc. E (1969).

18. In addition, as Judge Keasler concluded, the memorandum also improperly intrudes into the independent power of the judiciary by attempting to "dictate to the judiciary what law to apply or how to interpret the applicable law." Pet. App. 30a.

The Court has recognized a limited set of circumstances in which the President may wield independent authority in the field of international relations. Medellín relies upon the four arguably most notable foreign affairs power cases in support of his assertion that the President has constitutional authority to issue and enforce the memorandum: *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); and *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003). A careful review of these cases, however, demonstrates that the President's action here does not comport with the standards set forth by the Court delineating wherein the Executive possesses inherent power to act in foreign affairs without congressional authorization.

In *Belmont*, the Court gave effect to an executive agreement with the Soviet Union that assigned all Soviet assets in the United States to the federal government for the purpose of settling outstanding claims between the Soviet government and American citizens. *Belmont*, 301 U.S., at 330. Because the agreement was made with the specific purpose of facilitating the recognition and establishment of diplomatic relations with the Soviet Union — a function deemed to fall entirely within the competence of the President — the Court concluded that the President had the authority to act as the sole organ of the national government, and therefore the assignment arising from the executive agreement did not require Senate advice and consent. *Id.* Similarly in *Pink*, the Court enforced the same agreement considered in *Belmont* against the State of New York on grounds that the "[p]ower to remove such obstacles to full recognition as [the] settlement of claims of our nationals . . . certainly is a modest implied power" of the President. *Pink*, 315 U.S., at 229. Thus, both *Belmont* and *Pink* predicated the President's authority to act without Senate

advice and consent on the President' implied power to recognize foreign countries, a premise for presidential authority that is not present in this case.

In *Dames & Moore*, the Court enforced an executive order suspending the claims of American nationals against Iran and subjecting them to binding arbitration in an Iran-United States Claims Tribunal pursuant to a hostage release agreement with Iran. *Dames & Moore*, 453 U.S., at 686. The Court based its decision on the ground that claim settlement by executive agreement was a longstanding practice to which Congress had acquiesced. *Id.*, at 678-80. Indeed, the Court stressed that, "[c]rucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*, at 681.

As explained above, there is no history of congressional acquiescence, express or implied, authorizing the issuance of the Executive memorandum. Indeed, the very notion of historic congressional acquiescence to a particular type of independent executive foreign affairs action presupposes that there is "precedent" for the act.[19] In this case, however, the United States itself has candidly characterized the Executive memorandum as an "unprecedented" executive action,[20] and with good reason. There is simply no history at all of

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19. For example, in *Dames & Moore* the Court noted that " . . .the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate." *Id.*, at 681.

20. *See* Amicus Curiae Brief of the United States submitted in *Sanchez-Llamas*, at 29-30 ([T]he President has taken *unprecedented* action . . . to ensure compliance with the ICJ's judgment in *Avena* by determining that the convictions and sentence of the 51 Mexican nationals covered by that judgment receive review and reconsideration.") (emphasis added).

congressional acquiescence to an executive memorandum issued to the States, unsupported by any executive agreement, that purports to abrogate state criminal procedure statutes and force state courts to implement the judgment of a foreign tribunal.

In *Garamendi*, the Court held that a California statute requiring California insurers that sold insurance policies in Europe during the Holocaust to disclose certain information pertaining to those policies was preempted by the President's direct exercise of foreign affairs authority. *Garamendi*, 539 U.S., at 401. The preemption was specifically based on the President's effort to negotiate a settlement of Holocaust-era claims with Germany through the German Foundation Agreement. *Id.* In *Garamendi*, as in *Dames & Moore*, the Court affirmed the President's actions by citing the "particularly longstanding practice" of making executive agreements to settle the claims of American nationals against foreign governments. *Id.*, at 414-15. Of course, there is no such agreement in this case.

Thus, the notion that the President possesses a general power to use any means necessary, including mandating the enforcement of ICJ decisions in state courts, to resolve disputes with foreign governments without congressional authorization or an executive agreement is not consistent with any of the holdings of the executive-power decisions relied upon by Medellín. Rather, these cases serve to highlight the unprecedented nature of the Executive memorandum and the fact that here, unlike in those cases, Medellín's petition asks the Court to uphold presidential action contrary to the will of

Congress and therefore at the "lowest ebb" of his *Youngstown* authority. The Court should not do so.[21]

B. A Mandatory Construction of the Executive Memorandum Also Improperly Attempts to Vest the President With Authority to Alter the States' Systems for the Administration of Criminal Justice.

As the Court has consistently recognized, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). The Court has also emphasized in the strongest terms the importance of this foundational principle of federalism: "Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States* v. *Morrison*, 529 U.S. 598, 618 (2000).

And, to the limited extent the Federal Government has power over state criminal proceedings, that authority is derived from powers vested specifically in Congress, not the President: the power to enforce federal constitutional rights, U.S. CONST. amend. XIV, §5, to regulate the jurisdiction of the federal

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21. Indeed, given the lack of constitutional support for the notion that the Executive memorandum could operate as binding federal law abrogating Texas's criminal statute, it is most plausibly read as a request that States implement *Avena* to the extent permissible under state law — rather than as an executive order. The memorandum's language also supports construing it as such a request. It describes the States "giv[ing] effect" to the *Avena* decision "in accordance with general principles of comity." Pet. App. 187a. As the Court has long recognized, comity is a discretionary doctrine because "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). By invoking comity as the basis under which the States might give effect to *Avena*, it is unlikely that the President was *ordering*, as opposed to encouraging, them to perform any particular act.

courts, *id.*, art. III, §1, and to regulate the federal writ of habeas corpus specifically under the Suspension Clause, *id.*, art. I, §9; *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). The President has no such general powers.

Critically, the Texas statute at issue — Article 11.071 of the Texas Code of Criminal Procedure — is not a law targeted in any way at foreigners or foreign nations. It is Texas's criminal procedure statute governing the jurisdiction of Texas courts to consider the merits of subsequent applications for state habeas relief filed in a death penalty case. *See* TEX. CODE CRIM. PROC. art. 11.071.[22] It is hard to conceive of a law less appropriate to be abrogated by presidential fiat. Article 11.071 is: (1) a state statute governing the administration of Texas's criminal justice system; (2) it is applied neutrally without targeting in any way foreign affairs issues, and (3) it concerns the circumstances under which state habeas relief may be granted.

The Court has recognized that States have a general right to set out the parameters of the jurisdiction of their own courts. In *Howlett* v. *Rose*, the Court noted that "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, [the Court] must act with utmost caution before deciding that it is obligated to entertain the claim." 496 U.S. 356, 372 (1990). The Court further explained that "[t]he general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Id.* (internal citations omitted).

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22. *See Ex parte Graves*, 70 S.W.3d 103, 115 (Tex. Crim. App. 2002) ("[I]n [*Ex parte*] *Davis*, this Court recognized that the Legislature, by enacting article 11.071, section 5, intended to limit this Court's jurisdiction over subsequent habeas petitions in death penalty cases.") (citation omitted).

And this must especially be true when the State is not required to provide *any* access to the courts. Such is the case with habeas corpus. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) ("States have no obligation to provide [postconviction] relief."). Yet the Executive memorandum, understood and enforced as a binding executive order, would forcibly alter the statutory jurisdiction of Texas courts as well as the parameters of state habeas corpus relief in Texas.

When considered in light of the traditional balance of federal-state sovereignty under the Constitution, according preemptive effect to a unilateral two-paragraph Executive memorandum — especially where the Executive explicitly agrees that the no international agreement requires any judicially-cognizable response — would be utterly without precedent. To allow executive fiat to abrogate state criminal statutes and to bind state habeas courts, merely in the name of international "comity," would potentially open the door to the wholesale preemption of state statutes across a wide range of subjects. Medellín's argument for just such an expansion of executive power runs contrary to the text of the Constitution and to this Court's prior decisions and so does not warrant this Court's review.[23]

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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23. A mandatory construction of the Executive memorandum would also violate the anticommandeering doctrine. The anticommandeering doctrine prohibits Congress from conscripting state legislatures or executive officers as its agents. *See New York v. United States*, 505 U.S. 144, 175-78 (1992); *Printz v. United States*, 521 U.S. 898, 925-26 (1997). Similarly, the Executive may not, consistent with the anticommandeering doctrine, force state courts to implement a federal remedy unauthorized by Congress and outside their jurisdiction under state law.

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